

REMARKS

Claims 1-15 are in this application.

Claims 1-7 have been examined, claim 15 is new, and claims 8 to 14 are withdrawn.

Support for new claim 15 is found in the specification on page 3, lines 7-8. Support for the amendments to claims 1-7 is found, for example, in Examples 1 and 2 that describe that the components are added by weight.

The Examiner states that claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Whurmann et al. (US 3,715,216) and in view of Gocho et al. (JP 59075978 A), Abstract), Todd Jr. (US 4,877,635), Hughes et al. (US 4,199,610) and Igoe et al. (Dictionary of Food Ingredients, 2001).

This rejection is respectfully transversed.

The present application provides a rosemary flavored beverage powder comprising encapsulated rosemary flavor 0.47 - 3.70% by weight, rosemary extract 4.60 - 10.50% by weight, sucrose 84.30 - 94.90% by weight, organic acid 0.07 - 1.60% by weight, anticaking agent 0.009 - 0.50% by weight, and sodium benzoate 0.01 - 0.40% by weight. This powder can be used in tonic waters and other therapeutic preparations.

Wuhrmann et al. (U. S. Patent 3,715,216) relates to composition for preparing beverages resembling natural fruit juices, especially natural juices which are relatively cloudy in appearance. It is disclosed that the object of this reference is to provide beverages which resemble natural fruit juices in flavor and appearance. It is stated in column 2, lines 23-30:

However, most of the ingredients are common to all compositions. This is the case of sugar, comestible acids and the clouding agent. On the other hand, the type and quantity of flavoring, coloring matter, pectin, mineral salts, vitamins,

etc., are selected so that the composition of the artificial beverage corresponds as far as possible to that of the natural juice.

This statement supports that the selection of particular components in particular amounts is not obvious.

Gocho et al. (JP59075978 A, abstract) refers to the use of the antioxidant agent rosemary which can be added to food and beverage. However, apart from rosemary flavor, the other components of the rosemary flavored beverage powder (rosemary extract, sucrose, organic acid, anticaking agent, and sodium benzoate) are not disclosed.

Todd Jr. (U.S. Patent 4,877,635) discloses a method for preparing an extract of rosemary. Although there is a general statement in column 14 that the extract can be used in the manufacture of food, there is no disclosure of a powder formulation nor the other components of the claimed invention.

Hughes et al. (U.S. Patent 4,199,610) relates to aqueous carbonated beverages comprising sugar, flavorant and acidulant wherein said flavorant and acidulant is a cola base material. Hughes specifically limits the use to a beverage which contains phosphoric acid as a flavoring ingredient and acidulent. The present application provides a rosemary flavored beverage powder comprising of rosemary flavor, rosemary extract, sucrose, organic acid, anticaking agent, and sodium benzoate which can be used in tonic waters and other therapeutic preparations. Therefore, this citation is not relevant to rosemary flavored beverage powder as claimed in present application.

Igoe et al. (Dictionary of Food Ingredients, 2001) mentions the use level ranges of sodium benzoate between 0.03 to 0.1. This is a general information and not specific to rosemary flavored beverage powder.

As stated above, the invention relates to rosemary flavored beverage powder comprising of rosemary flavor 0.47 - 3.70% by weight, rosemary extract 4.60 - 10.50% by weight, sucrose

84.30 - 94.90% by weight, organic acid 0.07 - 1.60% by weight, anticaking agent 0.009 - 0.50% by weight, and sodium benzoate 0.01 - 0.40% by weight.

There is no teaching, suggestion or motivation in the combination of references to the claimed powder. The examiner's reliance on this combination of references is based on impermissible hindsight. According to MPEP 2141 when applying 35 USC 103, the following tenets of patent law must be adhered to:

(A) The claimed invention must be considered as a whole; (B) The references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination; (C) The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention and (D) reasonable expectation of success is the standard with which obviousness is determined.

In making this rejection, the Examiner is relying on impermissible hindsight.

A reference must be considered for what it would teach someone skilled in the art at the time the invention was made and not be applied based on "hindsight". See *Panduit Corp. V. Dennison Manufacturing Co.* 227 USPQ 337, 343 (Fed. Cir. 1985):

It is impermissible to first ascertain factually what applicants did and then view the prior art in such a manner as to select from the random facts of that art only those which may be modified and then utilized to reconstruct appellants' invention from such prior art.

In making its obviousness determination, a court must view the prior art without reading into that art the patent's teachings. *Vandenberg v. Dairy Equipment*, 224 U.S.P.Q. 195 (Fed. Cir. 1987) citing *In re Sponnoble*, 160 U.S.P.Q. 237 (CCPA 1969). In *Uniroyal . Rudkin-Wiley*, 50 U.S.P.Q.2d 1434, 1438 (Fed. Cir. 1988) the CAFC stated:

The obviousness standard, while easy to expound, is sometimes difficult to apply. It requires the decision maker to return to the time the invention was made. The

invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time...That which may be clear and thus obvious to a court, with the invention fully diagramed and aided by experts in the field, may have been a breakthrough of substantial dimension when first unveiled [citations omitted]. In this case we are convinced that the district court misapplied the obviousness standard. It has impermissibly used hindsight to reconstruct the claimed invention from prior art with the invention before it and aided by Uniroyal's expert, rather than viewing the invention from the position of a person of ordinary skill at the time it was made. When prior art references require selective combination by the court to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight gleaned from the invention itself.

In making this rejection, the examiner clearly relied on impermissible hindsight as none of these references are linked to one another so as to suggest or teach the claimed invention e.g. these particular components in combination.

Therefore, it is respectfully requested that the rejection be withdrawn.

It is submitted that this application is in condition for allowance and favorable consideration is respectfully requested.

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